



Claimant contends Judge Howard erred. In essence, claimant argues his testimony, coupled with that of two co-workers and a receipt for the purchase of work boots, establishes that work orders are not always accurate and that he injured his back as alleged. Consequently, claimant requests the Board to reverse the August 16, 2007, Order and to find this claim compensable. Claimant argues as follows:

. . . the clear testimony of the claimant, his two co-workers Diaz and Mobley indicated that the work in question happened between September 1, 2005[,] and September 6, 2005. Even Mr. Cope referenced the weekend after Mr. Aspley [claimant] purchased new work boots as when he told him about his back injury but Mr. Cope claimed that was on September 19, 2005. The sales receipt from Cabelas shows the transaction as on the Sunday of the Labor Day weekend September 4, 2005. . . . There has been no testimony of the ability of Cabelas to over ride and change computer entries such as the testimony of everyone that Kevin Cope has that power. The weight of the evidence supports the claimant[']s position that he was performing the work alleged on the date of his claimed accident, contrary to the findings of the Administrative Law Judge.<sup>3</sup>

Conversely, respondent and its insurance carrier (respondent) argue the August 16, 2007, Order should be affirmed. Respondent argues that claimant testified he injured his back on September 6, 2005, pulling out wooden planks from the floor of a moving van. But based upon claimant's timecards and respondent's work orders, respondent asserts that claimant was not removing floor planks from that trailer during the period alleged. Respondent also argues claimant did not report a work injury until October 4, 2005, at which time claimant failed to mention an incident while removing floorboards. Finally, respondent contends the work orders on the trailer in question were not modified and any changes to claimant's timecards are noted by an asterisk. In short, respondent argues:

Claimant's theory of modifications to his time cards and work orders is not supported by the credible evidence. His only other theory of recovery is that he must have had an accident around Labor Day weekend because of his receipt to purchase boots. The boots receipt has no impact on his sworn testimony of when he was injured (9/6/05), the activity he alleges (pulling wood planks with a pry bar) and whether he was actually doing said work as alleged. As such, the boots receipt has no probative value on accident.<sup>4</sup>

The only issue before the Board on this appeal is whether claimant established he injured his back working for respondent from September 1 through September 6, 2005.

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<sup>3</sup> Claimant's Brief at 12 (filed Sept. 18, 2007).

<sup>4</sup> Respondent's Brief at 2 (filed Sept. 27, 2007).

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record compiled to date and after considering the parties' arguments, the undersigned Board Member finds and concludes as follows:

This is the second preliminary hearing that has been held in this claim. The first preliminary hearing was held on April 18, 2006. In an Order dated April 24, 2006, Judge Howard denied claimant's request for benefits after finding on the date of the alleged accident claimant was not performing the work that allegedly caused his back injury. The transcript from that hearing is part of the record on this appeal.

Respondent, a moving and storage business, employed claimant as a tractor and trailer mechanic. At the time of the April 2006 preliminary hearing, claimant had worked for respondent for almost six years.

Claimant alleges he injured his left leg and low back working for respondent during the period from September 1, 2005, through September 6, 2005, in a series of repetitive traumas he sustained while removing and replacing the wooden planks in a moving van. Before that alleged accident, claimant had neither received medical treatment nor missed any work because of his left leg or low back.

But claimant contends his physical condition changed on September 1 and 2, 2005. On those two days, which were the Thursday and Friday before the Labor Day holiday on September 5, 2005, claimant testified he was tearing out the wooden floor of a moving van, which claimant described as physically demanding.

During that two-day period to remove the floor there's some sawing and using a sledgehammer and prying and pulling and busting up the old wood to get it out to be able to get the new wood put in and prepare the floor for new wood.<sup>5</sup>

Over the Labor Day weekend, claimant testified he experienced some pain in his left leg and low back. But upon returning to work on September 6, 2005, and resuming work on the wooden flooring, claimant's pain allegedly increased. Claimant's pain eventually increased to the point he could no longer tolerate it. Claimant first testified that on either September 7 or 8, 2005, he told his supervisor, Kevin Cope, that his low back and left leg were hurting. Claimant testified, in part:

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<sup>5</sup> P.H. Trans. (Apr. 18, 2006) at 8.

I told him that -- my mind just went blank. I told him that due to removing that -- removing the floor and doing all the pounding and prying and pulling and busting up the old wood to be replaced that I might have pulled a muscle or so in my back or something causing pain. And then I had also purchased a new pair of boots which I thought possibly might have been some of the problem, too.<sup>6</sup>

But during cross-examination at the April 2006 preliminary hearing, claimant testified there was one particular incident at work on Tuesday, September 6, 2005, when he suddenly experienced pain and that he was certain he notified his supervisor of the incident on that day.

Q. (Mr. Graham) . . . Was there a particular activity that happened that suddenly you noticed pain while you were at work?

A. (Claimant) Yes, while I was removing that wood floor because there's a lot of prying and pulling and tearing that floor out with a sledgehammer, whatever you can get your hands on to remove that floor. And when your pry bar, when you're prying and it slips and -- you're liable to hurt anywhere.

Q. So specifically the event was you were using a pry bar and as you were pulling it up you noticed something?

A. Yes, I did.

Q. What day did that happen on?

A. That was probably on Tuesday.

Q. Tuesday, September 6th? And I'm not trying to trick you on the days, but Thursday is the 1st, Friday is the 2nd, Tuesday is the 6th?

A. That would be -- it would have been Tuesday, the 6th.

Q. And you're certain it was pulling this -- using a pry bar?

A. Yes.<sup>7</sup>

Claimant was certain he reported the incident to his supervisor on that same day. But he later testified that October 4, 2005, was the first time he told respondent he was alleging a work-related injury.

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<sup>6</sup> *Id.* at 12.

<sup>7</sup> *Id.* at 19, 20.

According to claimant, he continued to work despite his continuing symptoms. On September 20, 2005, he saw his personal physician for his leg and low back. A document generated from that visit notes “[s]ciatic nerve problem x [unidentifiable mark] wk. Wore new boots to work. . . .”<sup>8</sup> The document also notes there was no known injury.

On September 21, 2005, claimant left work early because of his pain. And the next day, he only worked one hour. Claimant then began taking vacation leave from approximately September 22 through October 10, 2005. And it was during this vacation period that claimant went into work and prepared an incident report for respondent. That report, which claimant signed and dated October 4, 2005, does not specifically mention working on the moving van’s wooden floor. The report reads, in part:

On or about Sept. 6[,] 2005, I started having pain in my left leg & buttock. Prior to this pain I had noticed stiffness in my lower back but ignored it due to the type of work that I perform on a daily bases [sic]. The work I do does have a profound efect [sic] on a person[']s back. I did purchase a new pair of footwear that I thought may be the problem, I stopped wearing the new footwear & went back to my old pair of footwear, I even wore tennis shoes for a couple of days but pain only persisted.<sup>9</sup>

At the April 2006 preliminary hearing claimant presented the December 19, 2005, medical report from Dr. Vito J. Carabetta. That report contains the following history:

The patient reported his complaints on September 6, 2005. He was working as a mechanic with this company at the time. The week had just started, and he recalls no particular event that triggered his complaints that day. However, several days prior to that, they had been pulling off the floorboards from an old trailer. This required a lot of bending and forceful pulling. His complaints were noted over a time span of a few hours, and then seemed to worsen.<sup>10</sup>

Dr. Carabetta diagnosed a herniated disk at the L5-S1 intervertebral level and left L5 radiculopathy. Moreover, the doctor concluded:

I suspect that the activities of a few days prior to September 6, while pulling up floorboards in an old trailer, were likely the true source of his complaints. The

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<sup>8</sup> *Id.*, Resp. Ex. B.

<sup>9</sup> *Id.*, Resp. Ex. A at 1.

<sup>10</sup> *Id.*, Cl. Ex. 1 at 1.

diagnosis of radiculopathy and the disk herniation appears related to his work injury.<sup>11</sup>

In late January 2006, Dr. Glenn M. Amundson evaluated claimant at the request of Dr. Carabetta. Dr. Amundson recommended a left L5-S1 discectomy and a right L4-5 lateral recess decompression. But respondent refused to provide that treatment. Without undergoing surgery, claimant returned to work for respondent under Dr. Amundson's recommended restrictions. As of the April 2006 preliminary hearing, claimant testified he was continuing to experience low back pain and symptoms down into his legs.

Claimant's supervisor, Kevin Cope, also testified. According to Mr. Cope, claimant could not have injured his back removing floorboards as alleged because claimant's time records show he was doing other work during the period in question. Moreover, claimant's time records indicate the last time that he removed floorboards was in May 2005. According to Mr. Cope, claimant spent approximately 37 hours on the trailer in question between September 14 and September 21, 2005.

Mr. Cope also confirmed that claimant did not report a work-related injury until October 4, 2005, and that September 19, 2005, was the first time that claimant spoke of having back pain. Mr. Cope recalls the September 19, 2005, date as it was a Monday and it was before claimant took off work due to his back complaints. Mr. Cope specifically remembers claimant telling him over the weekend he had purchased new boots, which he thought were causing him back pain. According to Mr. Cope, claimant did not relate his back complaints to work when he took off work early on either September 21 or 22, 2005. Moreover, when claimant came into work in early October 2005 to fill out an incident report, claimant did not mention that he thought working on floorboards had caused his back pain.

Following the first preliminary hearing, claimant presented testimony from two former co-workers. Matthew Mobley, who worked alongside claimant as an apprentice and who completed the job on the trailer in question, disagrees with respondent's records that work on the trailer began on September 12, 2005, as he believed claimant began work on the trailer in question in early September 2005 before Labor Day. Mr. Mobley also recalled claimant grinding the heels of his work boots because of discomfort in his back and leg. And Mr. Mobley remembers that occurring during the period that claimant was working on the trailer in question.

In addition, Jimmy Diaz, who worked in a maintenance bay next to claimant in September 2005 and who continues to work in respondent's maintenance department, testified it took over a month to repair the trailer in question. Mr. Diaz also recalls that

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<sup>11</sup> *Id.*, Cl. Ex. 1 at 3.

claimant began complaining about back pain shortly after purchasing new boots. Finally, Mr. Diaz testified that Mr. Cope has changed the dates on work orders in other instances.

At the August 2007 preliminary hearing, claimant presented the medical report of Dr. P. Brent Koprivica, who examined claimant in March 2007. That report indicates claimant left respondent's employment in June 2006 and underwent back surgery on June 9, 2006. The doctor concluded claimant injured his back working for respondent.

Judge Howard determined claimant failed to prove he injured his back at work working on the wooden floor of a trailer from September 1 through September 6, 2005, as alleged. There is no question that claimant's work was physically demanding. And there is no question that claimant developed back and leg symptoms in September 2005 that eventually progressed to the point he was unable to work. There is some question, however, if claimant initially reported his back pain to his supervisor on September 6, 2005, following the Labor Day weekend or whether he reported it later.

In either event, respondent's work orders and time records establish that claimant did not begin working on the trailer in question until approximately September 12, 2005, which falls outside claimant's alleged period of accident. And although Mr. Cope was able to change the entries on claimant's timecards, those changes are noted by an asterisk. Moreover, claimant's time records do not indicate Mr. Cope had changed the commencement date on the work order for the trailer in question. Consequently, the August 16, 2007, Order should be affirmed.

**WHEREFORE**, the undersigned Board Member affirms the August 16, 2007, Order entered by Judge Howard.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of November, 2007.

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BOARD MEMBER

c: Michael R. Lawless, Attorney for Claimant  
John Graham, Jr., Attorney for Respondent and its Insurance Carrier  
Steven J. Howard, Administrative Law Judge